Supreme Court, U. S.
FILED
FEB 22 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-872

COMMITTEE OF INTERNS AND RESIDENTS,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

and

NEW YORK STATE LABOR RELATIONS BOARD,

Respondents.

REPLY OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MURRAY A. GORDON
GORDON & SHECHTMAN, P.C.
Attorneys for Petitioner
666 Third Avenue
New York, New York 10017
Tel. (212) 661-7900

TABLE OF CONTENTS

	PAGE
Opinion Below	1
Reasons Relied Upon	1
I. *Bethlehem Steel* v. *New York State Labor Relations Board*, 330 U.S. 767 (1947), does not sustain respondent's argument that the petition should be denied	1
II. The limited scope of judicial review which would result from the position asserted by the NLRB here is an additional reason for allowing the petition	4
CONCLUSION	6

TABLE OF AUTHORITIES

CASES:

Bethlehem Steel Co. v. *New York State Labor Relations Board*, 330 U.S. 767 (1947)	1, 2, 3, 4
Leedom v. *Kyne*, 358 U.S. 184 (1958)	4
National Labor Relations Board v. *Committee of Interns and Residents*, 566 F.2d 810 (2d Cir. 1977)	1, 5n.2
Physicians National Housestaff Ass'n. v. *Murphy*, D.D.C. Civil No. 77-0358, 97 L.R.R.M. 244 (January 17, 1978)	4
Vaca v. *Sipes*, 386 U.S. 171 (1967)	5

STATUTES:

	PAGE
National Labor Relations Act § 10(f); 29 U.S.C. § 160 (f)	4
National Labor Relations Act § 14(a); 29 U.S.C. § 164 (a)	3, 4
National Labor Relations Act § 14(c); 29 U.S.C. § 164 (c)	3, 4
National Labor Relations Act § 14(c) (1), (2); 29 U.S.C. § 164(c) (1), (2)	3

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-872

COMMITTEE OF INTERNS AND RESIDENTS,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

and

NEW YORK STATE LABOR RELATIONS BOARD,

Respondents.

REPLY OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion Below

The opinion of the Court of Appeals for the Second Circuit is officially reported at 566 F.2d 810.

REASONS RELIED UPON

I.

***Bethlehem Steel* v. *New York State Labor Relations Board*, 330 U.S. 767 (1947), does not sustain respondent's argument that the petition should be denied.**

The brief of the National Labor Relations Board ("NLRB") in opposition to the petition relies almost ex-

clusively upon the decision of this Court in *Bethlehem Steel Co.* v. *New York State Labor Relations Board,* 330 U.S. 767 (1947). That case is distinguishable for reasons we have already briefed. Petitioner's Brief ("Pet. Br.") 26-33.

The District Court also distinguished *Bethlehem Steel* on the grounds that at the time of *Bethlehem Steel* the NLRB concededly had jurisdiction over the supervisory employees there involved so that the NLRB possessed the necessary cognizance to declare a national labor policy as to such employees, and here the NLRB has presumed to declare a preemptive national labor policy as to house staff officers over whom the NLRB has no jurisdiction if, as the NLRB found, they are not employees for the purposes of the National Labor Relations Act ("NLRA"). Petitioner's Appendix ("Pet. App.") 22a-24a. This decisive distinction between *Bethlehem Steel* and this case is disputed by the NLRB, which claims that "here the Board never denied its jurisdiction over the housestaff petitions." NLRB Brief ("NLRB Br.") 9. The NLRB is plainly wrong in this respect. The petitions were dismissed because the NLRB found housestaff not to be employees and, therefore, the petitioning housestaff associations not to be labor organizations for purposes of the NLRA (Pet. App. 3a-5a, 20a-22a, 23a-24a), and it is precisely employee and labor organization status which is the NLRA statutory predicate for NLRB jurisdiction (Pet. App. 21a-22a).

The implications sought here to be drawn by the NLRB from *Bethlehem Steel* are so vast as to warrant this Court's review and clarification of *Bethlehem Steel.* We read *Bethlehem Steel* to deal with the preemption of state coverage of supervisory employees where the NLRB and this Court perceived such coverage to interfere with the integrity of the bargaining process of NLRA-covered rank-and-

file employees. The NLRB expressly rejects such a construction (NLRB Br. 9 n.5), and reads *Bethlehem Steel* much more broadly to authorize the NLRB to deny collective bargaining rights,—state or national,—to any group of putative employees wherever the NLRB has made the "determination that it would not effectuate national labor policy to extend collective bargaining rights" (*id.* at 9), without any showing that state coverage of such putative employees involves any NLRA-protected or NLRA-phohibited activities of those or any other employees (see Pet. App. at 21a-22a). We believe it an unprecedented assertion of administrative power over our system of federalism to contend, as does the NLRB here, that wherever that agency determines that collective bargaining is not an appropriate modality for the participants in any activity with an employment component, the NLRB can, without any further legislative authorization or instruction, proscribe not only NLRA-coverage but any state or local labor relations coverage.

Moreover, serious impairment of NLRA § 14(c) (29 U.S.C. 164(c)) (Pet. App. 57a) is necessarily implicated by the NLRB's application of *Bethlehem Steel.* If the NLRB is correct, exclusion of groups from coverage by the NLRB need not be premised upon an express NLRA § 14(c)(1) declination of jurisdiction,—a "determination that it would not effectuate national labor policy to extend collective bargaining rights" would suffice to exclude coverage. By this process, the NLRA § 14(c)(2) consequence of state jurisdiction, where NLRB jurisdiction is declined pursuant to NLRA § 14(c)(1), could be readily averted by the NLRB.

Bethlehem Steel, which was superseded by NLRA § 14 (a) within the year it was decided (see Pet. Br. at 28) and hardly referenced thereafter (*id.* at 31-32 n. 20), plainly cannot sustain the weight with which it is freighted by the

NLRB. The powers claimed under *Bethlehem Steel* by the NLRB were nowhere perceived or articulated by the Court in *Bethlehem Steel* or elsewhere. And if *Bethlehem Steel* can be fairly construed to support its reading by the NLRB, then it is timely for this Court to review *Bethlehem Steel* in the light of the supervening and material language and history of NLRA §§ 14(a) and 14(c). See Pet. Br. at 28-31.

II.

The limited scope of judicial review which would result from the position asserted by the NLRB here is an additional reason for allowing the petition.

After the petition was filed here, the United States District Court for the District of Columbia, by decision dated January 17, 1978, granted the motion of the NLRB for summary judgment and dismissed the complaint of the petitioner here and other housestaff associations seeking to review and reverse the NLRB determinations that housestaff are not employees within the meaning of the NLRA. *Physicians National House Staff Association, et al.* v. *Murphy, et al.* (Civ. No. 77-0358), 97 L.R.R.M. 2444. That decision did not deal with the merits in depth because it deemed the scope of review extremely limited, in the manner prescribed by *Leedom* v. *Kyne*, 358 U.S. 184 (1958), since review was sought of an NLRB determination in a representation proceeding.[1]

The NLRB invocation of the review strictures of *Leedom* v. *Kyne* is another basis for the allowance of the writ sought here. The extraordinary preemptive power claimed by the NLRB is predicated by the NLRB upon an under-

[1] NLRA § 10(f) judicial review was, of course, unavailable since no unfair labor practice proceeding was possible once the housestaff petitions were dismissed.

lying NLRB determination of housestaff exclusion and NLRB declaration of national labor policy which are, according to the NLRB, virtually subject to no judicial accountability.[2] Moreover, not only is the underlying determination thus largely immunized from judicial review if the NLRB prevails, but absent the granting of the writ here, subsequent NLRB determinations of preemption would be of doubtful reviewability.

In this litigation judicial review was at the instance of the NLRB because a state court had found state jurisdiction. See Pet. Br. at 6-10. But if the court below is sustained, the next occasion of NLRB preemptive exclusion of state and national coverage will likely not require the NLRB to initiate litigation on the issue of its powers to preempt. In such circumstances it is not clear whether the NLRB's position would allow any review of the exercise of the NLRB's newly asserted powers of preemption.

Similar considerations were influential on the issue of preemption in *Vaca* v. *Sipes*, 386 U.S. 171, 181-83 (1967). There the exercise of the NLRB General Counsel's "unreviewable discretion to refuse to institute an unfair labor practice complaint" (*id.* at 182) was held not to have a preemptive effect because to accord it such effect would mean that "the individual employee injured by arbitrary or discriminatory union conduct could no longer be assured of impartial review of his complaint" (*ibid*).

[2] The court below assumed that the "wisdom" of the NLRB housestaff decisions and the issue of whether "the NLRB abused its discretion" in those decisions, would be reviewed in the District of Columbia action. 566 F.2d at 816-17.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

GORDON & SHECHTMAN, P.C.
Attorneys for Petitioner Committee of Interns and Residents

By: .....

MURRAY A. GORDON
666 Third Avenue
New York, N. Y. 10017
(212) 661-7900